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## **DEPARTMENT OF STATE REVENUE**

### **LETTER(S) OF FINDINGS NUMBER(S): 96-0637, 96-0638, 96-0639, 98-0774, 98-0775, 98-0776 Withholding Tax Sales Tax For Tax Years 1995 through 1996**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

### **ISSUES**

#### **I. Withholding Tax—Number of Employees**

**Authority:** IC 6-8.1-5-1; IC 6-8.1-5-4

Taxpayer protests that it did not have the number of employees the Department used to estimate withholding taxes.

#### **II. Sales Tax—Estimated Sales**

**Authority:** IC 6-2.5-9-3; IC 6-8.1-5-1; IC 6-8.1-5-4; IC 6-8.1-8-1.5

Taxpayer protests that its sales were lower than estimated by the Department.

### **STATEMENT OF FACTS**

Taxpayers, a married couple, operated a restaurant from April 1995 through 1996. Taxpayers co-owned the business with a third party until they were awarded total ownership via court proceedings in late April 1995. From 1995 to 1996, the business operated under at least four separate legal arrangements. In as much as taxpayers were in control for this time, the Letter of Findings will treat this as a single entity. The Department issued assessments after determining

that taxpayers had underreported the amount of sales and the number of employees. Taxpayers protested the assessments. Further facts will be provided as required.

# **I. Withholding Tax—Number of Employees**

Taxpayer protests the withholding tax assessments for the tax years in question. The Department conducted the audit and, due to the lack of available records, determined assessments based on the best information available. IC 6-8.1-5-1(a) states in relevant part:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.

Taxpayers state that they never had any employees and never paid themselves, therefore they were not required to withhold any tax. The Department determined, after review of the best information available, that taxpayers had employees and estimated the number of employees and the wages that had been paid to them, and then the amount of tax due.

Taxpayers protest that they were the only people who worked in the restaurant. The Department determined that, due to the fact that the restaurant was open for business seventy-nine and a half hours a week and the fact that both taxpayers worked full-time at other jobs for the bulk of the taxable period, it would be impossible for the restaurant to be open without some employees to run it during the hours taxpayers were at work. The Department found other evidence of employees, including regular and irregular payments to individuals, names of “servers” on guest checks, and the posting of a liquor license for someone other than taxpayers.

Taxpayers protest that the Department used the listed operating hours and that these do not accurately reflect the hours the restaurant was actually open. Taxpayers explained that they operated the business in an informal basis and that they would not always adhere to the listed operating hours. IC 6-8.1-5-1(b) provides in relevant part:

The notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

Taxpayers did not provide records establishing that the Department’s estimation was incorrect. IC 6-8.1-5-4(a) states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person’s liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

In conducting its investigation of the taxpayers, the Department found insufficient records to determine the amount of any liability. As previously discussed, the Department based its assessments on the best information available, as provided in IC 6-8.1-5-1(a). Taxpayers failed to provide sufficient records to support their assertions that there were no employees and that the restaurant was not open during the posted hours.

### **FINDING**

Taxpayer's protest is denied.

## **II. Sales Tax—Estimated Sales**

Taxpayers protest the Department's assessment of sales tax on sales at taxpayers' restaurant. The Department conducted an investigation and determined that taxpayers had underreported sales and that additional sales tax was due. Taxpayers protest the assessment on several grounds.

Taxpayers protest that sales were not as high as estimated by the Department. The Department concluded in the course of the investigation that there was insufficient documentation to determine actual sales. IC 6-8.1-5-1(a) states in relevant part:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.

The Department used the best information available to determine the amount of sales tax due. Taxpayers believe that the Department's estimates of sales are too high. Taxpayers state that they provided records supporting the amount of sales they reported originally and that the Department should rely on those records

The Department examined the available records and determined that they were insufficient to provide an accurate sales record. IC 6-8.1-5-4(a) states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

While taxpayers provided register tapes, guest checks and other documents during the audit, the Department determined that these sources were incompletely or incorrectly filled out or rung up. The incomplete nature of the documentation compelled the Department to conclude that additional sales had occurred and that sales tax was therefore due.

Taxpayers protest that they paid back due sales taxes on July 17, 1996, and that they thought the matter was settled then. IC 6-8.1-8-1.5 states:

Whenever a taxpayer makes a partial payment on the taxpayer's tax liability, the department shall apply the partial payment in the following order:

- (1) To any penalty owed by the taxpayer.
- (2) To any interest owed by the taxpayer.
- (3) To the tax liability of the taxpayer.

Taxpayers provided a copy of a credit card receipt establishing a payment to the Department. Taxpayers did not provide documentation establishing what this payment was for. If the payment was for sales tax liabilities, it was applied first to penalties, then interest, then to the liabilities themselves. If there were other liabilities, the payment may have been applied towards those liabilities.

Taxpayers protest that the Department assessed sales on the first four months of 1995, and that they did not gain full ownership of and begin to operate the restaurant until late April 1995. Taxpayers provided documentation supporting this position. The Department refers to IC 6-2.5-9-3, which states in relevant part:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

IC 6-8.1-5-1(b) states in relevant part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Department issued its proposed assessments for the first four months of 1995 on the basis that taxpayers were members of a partnership retail merchant and had a duty to remit state gross retail taxes, and were therefore personally liable for the payment of those taxes as provided in IC 6-2.5-9-3. The information submitted for this protest does not explain the structure of the partnership and taxpayers' role in the partnership. Taxpayers have not established that they were not members of a partnership retail merchant.

In conclusion, taxpayers failed to keep adequate records as required by IC 6-8.1-5-4(a), and the Department issued proposed assessments using the best information available as provided in IC 6-8.1-5-1(a). The taxpayers have not established that they were not personally liable for payment of the state gross retail taxes, as explained in IC 6-2.5-9-3. Therefore, taxpayers have

not met their burden of proving the proposed assessments for the first four months of 1995 wrong, as explained in IC 6-8.1-5-1(b). The payment taxpayers made on July 17, 1996 will be reviewed by the Audit division of the Department to determine the extent of sales tax penalties, interest and liabilities satisfied by the payment.

**FINDING**

Taxpayer's protest is denied.

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